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In the Supreme Court of the United States

OCTOBER TERM, 1980

RUBY LAZAROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 425 F. 2d 638.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1970. A petition for rehearing was denied on June 18, 1970 (Pet. App. C). The petition for a writ of certiorari was filed on July 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case two references to the Mafia were unduly prejudicial.

2. Whether evidence of petitioner's invocation of the privilege against self-incrimination, which underlay a subsequent grant of immunity, should have been excluded in his subsequent prosecution for perjury before the grand jury.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on three counts of perjury, in violation of 18 U.S.C. 1621. On May 27, 1968, he was sentenced to concurrent terms of thirty months' imprisonment and fined $1,000. The court of appeals affirmed.

The evidence showed that, in 1966, a federal grand jury began an investigation of syndicated gambling activities upon information that several individuals in the syndicate had met in Palm Springs, California in October, 1965, and that telephones had been used there to transmit gambling information interstate (Tr. 73-76). Petitioner, as a participant in the Palm Springs meeting, was called before the grand jury on December 14, 1966. He refused to answer any questions, claiming his Fifth Amendment privilege against self-incrimination (Tr. 517). He was recalled on March 9, 1967 and again invoked the privilege. The government then obtained an order compelling him to testify, pursuant to immunity provisions of the Federal Com-

munications Act, 47 U.S.C. 409(1) (Tr. 522-523). On March 10, 1967, he again appeared, but, despite the grant of immunity, still refused to answer. He was found in civil contempt and committed to custody until he complied with the order (Tr. 534).

After seven months in custody, petitioner requested leave to appear before the grand jury. On October 18, 1967, he was called to testify (Tr. 81-83). During the course of his testimony, he stated that he recalled no one, including himself, using the telephones at the house in Palm Springs in October, 1965 (Tr. 449, 451); that he had never placed a wager with the Prokos brothers (bookmakers in Miami, Florida) (Tr. 149); and that he had never placed a bet with any bookmaker other than Mickey Zion (Tr. 147). These statements formed the basis for petitioner's later conviction for perjury.

At trial two witnesses testified that petitioner had used the telephone while at the Palm Springs residence in 1965 (Tr. 479, 502). Evidence also established that, during the summer preceding his visit to Palm Springs, calls charged to the credit card of the Prokos brothers were made daily to the Warwick Hotel in New York City where petitioner was then staying, or to the residence of petitioner's in-laws in Rockaway Beach, New York, where he sometimes visited (Tr. 90, 95; 158, 178; 199-210; 217). Calls charged to petitioner during his stay at the Warwick were made to the Multiple Sports Service, a line service located in Miami (Tr. 94; 214-215). Calls to the Multiple Sports Service had also been made from Palm Springs (Tr. 326-329).

ARGUMENT

1. The government's first witness, a former Assistant United States Attorney who had assisted in the grand jury proceeding, was called to testify to the purpose of the investigation. During the course of his testimony, he stated:

> [W]e had information that in Palm Springs, California, in October, 1965, there was a meeting at a certain residence there, which involved people who were reputedly very high up in the Mafia organized crime syndicate in this country. (Tr. 69)

Defense counsel objected to the reference to the "Mafia" as being highly prejudicial and moved for a mistrial. The trial judge denied the motion and twice instructed the jury that the testimony was hearsay and not admitted to prove the truth of what the witness said, but to show the nature of the investigation (Tr. 72, 75-76). Two days later, the prosecutor read a portion of the transcript of the grand jury proceeding of October 18, 1967: "Did Alo use the phone in connection with the gambling or other activities of the criminal syndicate known as La Cosa Nostra or the Mafia?" (Tr. 531). Defense counsel's motion for a mistrial was denied.

As defined by 18 U.S.C. 1621, perjury is committed when the witness "states * * * any *material* matter which he does not believe to be true * * * ." (Emphasis added.)

The first statement quoted above relates to the government information which prompted the grand

jury to investigate and was admitted for the limited purpose of establishing the materiality of petitioner's testimony before that body. Evidence identifying individuals with an organized criminal syndicate was relevant in this context. Moreover, the trial judge clearly defined the purpose of the testimony so that the jury would not be misled. Petitioner has shown no prejudice resulting from these references. *Spencer* v. *Texas*, 385 U.S. 554. See also, *United States* v. *Weber*, 197 F. 2d 237 (C.A. 2), certiorari denied, 344 U.S. 834; *United States* v. *Moran*, 194 F. 2d 623 (C.A. 2), certiorari denied, 343 U.S. 965.

As to the transcript reference, defense counsel, despite ample opportunity to have any offending portion of the transcript deleted before it was offered into evidence, made no objection either before or soon after this was read (Tr. 86, 138, 161). As the court below noted, petitioner cannot under such circumstances withhold objection to the testimony and then seek a mistrial after it has been introduced.

2. At trial, portions of the grand jury transcripts of December 14, 1966, March 9, 1967, and March 10, 1967, as well as the order requiring petitioner to testify under a grant of immunity and the order finding him in contempt, were read to the jury. This evidence revealed that petitioner had invoked his Fifth Amendment privilege both prior to and after being granted immunity. As the trial judge found, the evidence showed that petitioner's responses at the later grand jury proceeding were not made impulsively and that he "knew what he was up against" in deciding to testify. The judge properly found that the jury was

entitled to consider the evidence in determining the issue of willfulness (Tr. 439-440).

Unlike *Grunewald* v. *United States*, 353 U.S. 391, the evidence here was not introduced to impeach petitioner's credibility; there was no suggestion at trial that petitioner's claim of privilege was inconsistent with any later statement made by him. The prior testimony outlined a continuous sequence of reluctance to testify on the part of petitioner, even after being granted immunity when the privilege of the Fifth Amendment no longer applied. It thus bore directly upon his willfulness, tending to show that his statements were not made inadvertently or with a lack of understanding of the questions asked and negating any inference that surprise over the subject matter inquired into caused a temporary lapse of memory.[1]

We have discovered that, although petitioner was not at any time the subject of electronic surveillance directed against him, he participated in a telephone conversation that was overheard during the course of surveillance of premises in which petitioner had no proprietary interest.[2] The overheard conversation oc-

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[1] Petitioner does not object to the admission of the order compelling him to testify and the later order finding him in contempt for his refusal to testify. Since both indicated to the jury that petitioner had previously claimed his Fifth Amendment privilege, any prejudice resulting from the reading of the transcripts was harmless. *Harrington* v. *California*, 395 U.S. 250; *Chapman* v. *California*, 386 U.S. 18.

[2] It is unclear whether petitioner's voice was actually overheard but for present purposes, standing is assumed. See *Alderman* v. *United States*, 394 U.S. 165, 176-180.

curred on March 4, 1965, seven months prior to the Palm Springs meeting and over two years before he gave the perjurious testimony for which he was convicted.

The log of that conversation disclosed only that petitioner was staying at the Warwick Hotel, New York City, on that date. At trial, evidence was introduced showing that petitioner, during the period of June 9-September 3, 1965, was staying at the Warwick and that he made telephone calls to a line service in Florida, and received calls daily which were charged to the Prokos brothers, bookmakers located in Miami. Petitioner stated before the grand jury on October 18, 1967 that he stayed at the Warwick during the summer of 1965 (Tr. 158). FBI agents testified that, on November 28, 1965, the Prokos brothers were arrested and their establishment searched (Tr. 105, 249). Lists found during the search revealed that petitioner was one of their customers (Tr. 175, 216, 373). The Prokos investigation uncovered a record of telephone calls charged to the bookmakers' account made to the Warwick while petitioner was there.

The procedure which this Court has usually followed, when advised by the Solicitor General that the government had conducted illegal electronic surveillance involving a convicted litigant, has been to remand the proceeding to the district court for a hearing to determine whether the interception was in fact illegal and, if so, whether the conviction was tainted thereby. *E.g.*, *Alderman* v. *United States*, 394 U.S. 165. Resolution of the latter issue, if it is reached, has involved the determination whether the govern-

ment used the overheard conversation in "building its case against" the accused. *Alderman* v. *United States*, *supra*, 394 U.S. at 183. That petitioner was at the Warwick Hotel on March 4, 1965 bears no apparent relationship to his subsequent stay there. Even assuming that it might be relevant, his stay at the Warwick during the summer of 1965 was known to the government from the wholly independent and lawful sources of petitioner's own statements before the grand jury and the results of the Prokos investigation. Remand to determine whether the conviction was tainted is therefore unnecessary. See our brief in opposition in *Gordon* v. *United States*, No. 1340, O.T. 1969, certiorari denied, 398 U.S. 927; *Teresa* v. *United States*, No. 1200, O.T. 1969, certiorari denied, 397 U.S. 1063; and our supplemental memorandum in *Moylan* v. *United States*, No. 885, O.T. 1969, certiorari denied, 397 U.S. 910.[3]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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